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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 357

ALVA B. DAVIS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 556–557) is reported in 112 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 557). A petition for rehearing (R. 558–562) was denied August 2, 1940 (R. 563). The petition for a writ of certiorari was filed August 21, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioner is entitled to urge that error was committed in the overruling of a motion for continuance which he asserts was made on the day the trial commenced.

2. Whether the petitioner is entitled to secure a review of the sufficiency of the evidence.

STATEMENT

On September 21, 1939, an indictment in 14 counts was returned against the petitioner and another in the District Court for the Northern District of Texas (R. 1–44). The first 13 counts charged violations of the mail fraud statute (U. S. C., Title 18, Sec. 338); the fourteenth charged a conspiracy to violate that statute (U. S. C., Title 18, Sec. 88). The fraudulent scheme charged was aptly described in the opinion below as "the selling of land in Brewster and Presidio counties, Texas, for approximately $10 an acre, to about 1,000 purchasers, through misrepresentations as to its future potential unknown mineral possibilities and its value for agricultural purposes, when in truth the land was not worth over $1.00 to $1.50 an acre" (R. 557).

On September 23, 1939, the petitioner was arraigned and pleaded not guilty, and the case was

set for trial on September 27 (R. 58). On the same day petitioner moved for a continuance, which motion was overruled (R. 54–57). On October 2 the case came on for trial before the court, the petitioner having waived a trial by jury (R. 58–59, 97). Petitioner was found guilty by the court upon all counts, except the fifth (R. 548), and was sentenced to imprisonment for two years and fined $5,000 (R. 59). Petitioner's conviction was unanimously affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 556–557) and his petition for rehearing denied (R. 563).

ARGUMENT

I

Petitioner contends that error was committed by the trial court in denying a motion for continuance asserted to have been made by him on October 2, 1939, the day the trial commenced.[1] He concedes, however, that this motion and the ruling of the District Court thereon does not appear in the record and that the only reference to it contained in the record is found in his notice of appeal and assignment of errors (Br. 14–15).

Since petitioner's contention is predicated upon a purported ruling of the trial court which does not appear in the record, it is clear that the contention

[1] The petitioner does not now challenge the denial of his motion for continuance made on September 23, 1939.

cannot be made in an appellate court.[2] Moreover, we submit that the petitioner has failed to show any abuse of discretion by the trial court in overruling the motion for continuance upon which he relies. It is apparent (Br. 14) that the petitioner made no showing that he would be able to secure the presence of the witnesses in question within any reasonable time or, for that matter, that they would ever be available.

II

The petitioner is clearly not in a position to urge that the evidence was insufficient to sustain his conviction. Not only was the question of the sufficiency of the evidence not presented in the petitioner's assignment of errors in the court below (R. 81–97), but it does not appear from the record that any motion for an acquittal was made at the close of the case (R. 547–548). It is well settled that in such circumstances a review of the evidence is not required in an appellate court.[3]

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[2] *Claassen* v. *United States*, 142 U. S. 140, 147; *Price* v. *United States*, 74 F. (2d) 120 (C. C. A. 5th), certiorari denied, 294 U. S. 720; *Wolfle* v. *United States*, 64 F. (2d) 566, 567–568 (C. C. A. 9th), affirmed, 291 U. S. 7; *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10th); *Wainer* v. *United States*, 87 F. (2d) 77, 80 (C. C. A. 7th), certiorari denied, 300 U. S. 669.

[3] *Herman* v. *United States*, 48 F. (2d) 479, 480 (C. C. A. 5th); *Massenberg* v. *United States*, 19 F. (2d) 62, 63 (C. C. A. 4th); *Rossi* v. *United States*, 9 F. (2d) 362, 365 (C. C. A. 8th); *Baldwin* v. *United States*, 5 F. (2d) 133, 134 (C. C. A. 6th), certiorari denied, 269 U. S. 552; Clements v. *United States*, 297 Fed. 206, 207 (C. C. A. 9th), certiorari denied, 266 U. S. 605.

There is clearly no merit in petitioner's contention that there was a complete lack of evidence to establish that the value of the lands in question was misrepresented or that petitioner was responsible for the alleged misrepresentations made by salesmen. (See Appendix summarizing the evidence with reference to these matters.) It is only where there is an entire failure of proof that an appellate court may afford relief in the absence of an appropriate motion in the trial court.[4]

CONCLUSION

Since no conflict of decisions is involved and there is presented no important question of federal law, we respectfully submit that the petition for writ of certiorari should be denied.

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SEPTEMBER, 1940.

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[4] *Williamson* v. *United States*, 207 U. S. 425, 452; *Clyatt* v. *United States*, 197 U. S. 207; *Wiborg* v. *United States*, 163 U. S. 632.